UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SPECIAL TOUCH HOME CARE SERVICES, INC

and **CASE NO. 29-CA-26661**

NEW YORK'S HEALTH AND HUMAN SERVICE UNION 1199/SEIU, AFL-CIO, CLC [1]

Henry Powell, Esq., Rachel Zweighaft, Esq. and Rosalind Rowan Rossi, Esq., Counsel for the General Counsel
Richard J. Reibstein, Esq., Counsel for the Respondent
David Slutsky, Esq., Counsel for the Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York from May 17 through May 23, 2005. The charge and amended charges were filed on November 30, 2004 and January 28, 2005. The Complaint was issued on February 28, 2005 and alleged:

1. That on May 27, 2004, the Union notified the Respondent that it intended to strike, picket and engage in other concerted refusals to work at the Respondent's facility starting on June 7, 2004 at 6:00 a.m. and ending on June 10, 2004 at 6:00 a.m.

2. That on May 28, 2004, the Union faxed a notice to the Federal Mediation and Conciliation Service to the same effect.

3. That on or about June 2, 2004, the Respondent by Jasmine, a coordinator,[2] **(a)** interrogated employees about their union activities, **(b)** directed employees not to speak to union representatives, **(c)** directed employees not to sign union cards, **(d)** threatened to shorten employees' hours, **(e)** threatened employees with the loss of vacations and **(f)** threatened employees with the loss of patients if they went on strike.

4. That on June 7, 2004, certain employees ceased work and engaged in a strike.

5. That on or about June 8, 2004, the Respondent by Ana Gonzalez, a coordinator,

[1] It is my understanding that subsequent to the hearing in this case, the SEIU has terminated its affiliation with the AFL-CIO.

[2] The parties stipulated that those individuals occupying the position of coordinator were supervisors within the meaning of Section 2(11) of the Act.

made threats of reprisals to employees if they went on strike.

6. That from about June 8, 2004 until various dates in June 2004, the Respondent, for discriminatory reasons suspended 18 employees.

7. That from on or about June 8, 2004 until about June 28, 2004, the Respondent, for discriminatory reasons suspended Norma Lindao and has, since June 28, reduced her hours of work.

8. That from on or about June 8, 2004 until early August 2004, the Respondent, for discriminatory reasons suspended Reina Santiago and in early August until January 2005 reduced her hours of work.

9. That from June 8, 2004 until early August 2004, the Respondent, for discriminatory reasons suspended Lidia Solano and since August until September 11, reduced her hours of work.

10. That from June 8, 2004 until late June 2004, the Respondent, for discriminatory reasons suspended Petra Ortiz and since late June until August 2004, reduced her hours of work.

11. That on or about June 8, 2004, the Respondent, for discriminatory reasons constructively discharged Maria Nieves, Altagracia Matos and Zoila Nivelo.

12. That on or about June 8, 2004, the Respondent, for discriminatory reasons discharged Crecencia Miller, Melania Navarro and Lazurus Phillips.

13. That on or about June 10, 2004, the Respondent by Jasmine, **(a)** interrogated employees about their union activities, **(b)** made implied threats of reprisals, **(c)** threatened employees with discharge, and **(d)** directed employees not to sign union authorization cards.

14. That on or about June 17, 2004, the Respondent by Jasmine **(a)** interrogated employees about union activities, and **(b)** directed employees not to sign union authorization cards.

15. That on or about June 20, 2004, the Respondent by an assistant to Estrella **(a)** interrogated employees about union activities and **(b)** created the impression of surveillance.

16. That on or about June 30, 2004, the Respondent, for discriminatory reasons, reduced Ramona Then's hours of work.

17. That in mid-July 2004, the Respondent by Lydia, a coordinator, interrogated employees about their union activities.

18. That on or about August 23, 2004, the Respondent by Carmen Vasquez, a coordinator, **(a)** directed employees to speak to management before voting in an NLRB election and **(b)** threatened to close the agency if the employees voted for the Union.

19. That in August 2004, the Respondent, for discriminatory reasons discharged Petra Ortiz.

To make a long story short, the essential allegation in this case is that notwithstanding

an 8(g) strike notice having been given by the Union, the Employer refused to reinstate to their former positions of employment many of the employees who engaged in a one to three day strike that commenced on June 7 and ceased on June 9, 2004. The Respondent contends that despite the notice, the Employer was legally free to either not reinstate or reinstate to other jobs, employees who went out on strike who either did not give personal notification of their intention to strike or who had, during the previous week, personally indicated that they would work during the strike period.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practices

The Respondent is located in Brooklyn, New York and is a provider of home care services. In doing so, it is a subcontractor to various enterprises that provide nursing and health related services.

The employees involved are home health aides who are assigned by the Respondent to individuals who are either elderly or sick or both. They provide non-medical services such as housecleaning, shopping, cooking and bathing as well as such services as reminding clients to take their medications. Although trained in some first aid techniques, they are not licensed to and cannot provide any kind of medical services. When such services are needed, they are provided either by an attending nurse or a physician. Many of the clients are old and suffer such conditions as Alzheimer's, Parkinson's disease, Diabetes etc.

In June 2004, the Respondent employed about 2500 aides. At any given time, it had about 1400 aides who were assigned to specific clients. Some of the aides had permanent assignments and some were on-call employees who had ad hoc assignments. Nevertheless, the distinction between the two was somewhat fluid. Aides could be assigned for various period of time. Most patients have coverage by an assigned aide on a 5 day/4hr. per day basis or 53 hours per week. Some patients have aides on a 24/7 basis and the assignments are split between various employees. On the other hand, some patients need much less care and are visited by an aide for 2 hours per week. Upon release from a hospital or pursuant to a doctor's instructions, a nurse, (employed by a company other than the Respondent such as the Visiting Nurses Association), ascertains what degree of care is necessary and appropriate for each patient. The nurse also visits the home to make sure that the home is set up for the patient who may need to have special equipment or to make sure that furniture, rugs and utensils are maintained in a safe manner.

The clients are matched with aides, primarily on the basis of language. The four major languages are English, Spanish, Chinese and Russian. The Company uses three supervisors who supervise about 30 coordinators who in turn, give out the assignments to the aides.

On May 26, 2004, the Union filed a first petition in 29-RC-10216 seeking to represent the

home health aides of the Respondent. It seems that the Employer challenged the showing of interest and that this petition was withdrawn. The Union filed a second petition on June 21, 2004 in 29-RC-10233.

On May 27, 2004, the Union sent a 10 day notice to the Company, in conformity with Section 8(g) of the Act, stating that there would be a strike commencing on Monday, June 7, 2004 at 6:00 a.m. and ending on Thursday, June 10, 2004 at 6:00 a.m.[3]

During the week before June 7, the Respondent, through its supervisors, contacted its employees and asked if they intended to work during the week of June 7.[4] In many cases, employees said that they were going to participate in the strike while others said they would be coming into work. Based on the survey, and having a large reserve of on-call employees, the Company made arrangements to have on-call employees cover the clients of those aides who indicated that they were going to participate in the strike.

On June 7, 2004, many employees of the Respondent decided to engage in the strike. A group of 48 employees who engaged in the strike, did not previously notify the Respondent that they would not be at work during that week. The evidence was that all of these individuals had, at the time of the strike, permanent assignments to specific clients. That is, they were not on-call employees.

Of this group, 46 engaged in the strike for only one day and sought to return to work, at their previous assignments, on the morning of June 8. Two, Solia Peguero and Altagracia Matos participated in the strike from June 7 through June 9 and did not seek to return to their previous assignments until June 19.

With respect to those employees who engaged in the strike and who had notified the employer, during the preceding week, that they would be out of work from June 7 through June 9, they were put back to work at their previous assignments.

However, as to the 48 employees who went on strike and who had not given such personal notification to the Company,[5] there is no dispute that with the exception of Lazarus Phillips, (whom the Respondent asserts had quit before the strike) and Crecencia Miller and Melania Navarro, (whom it asserts were discharged for cause during or after the strike), they all were not immediately reinstated to their previous assignments until sometime after June 14, 2004. This is because management, by Linda Keehn, decided that this group had violated the Respondent's "no-call, no show" rule. In this regard, she sent a letter to this set of employees on June 14, 2004 stating:

> On May 28, 2004, the New York State Department of Health directed "Special Touch to conduct a survey… because of its concerns that some patients may not receive proper … service beginning June 7th…. You were asked if you would be taking any time off the week of June 7th. You told us that you would be working.
>
> Despite your assurance, you did not show up at the patient's home on June 7th, nor

[3] Although it is far from clear that the Respondent provides medical services, it seems that the parties herein, assumed that it is a health care facility within the meaning of the Act.

[4] The General Counsel does not contend that this activity constituted unlawful interrogation.

[5] There was testimony by General Counsel's witnesses that in many instances the aides told their clients and/or the client's families, during the week before June 7, that they intended to participate in the strike.

did you call into the office at any time prior to the start of your shift to advise us that you would not be working that day. As a result, you left the patient at risk at being unattended by a home health aide.

You know that Special Touch policies and procedures require you to call in. They provide that:

> You are expected to report to your assignment each day that you are scheduled. Incidents of unexcused absenteeism will be cause for disciplinary action and can result in you immediate dismissal.
>
> * * * *
>
> It has come to our attention that a number of … aides who failed to call in to tell us that they were not working on June 7th were confused whether they needed to call in. We understand that some aides were told by 1199/SEIU not to call in or that it was not necessary to call in. First of all, 1199 does not represent our employees. Second, it is our belief that these types of statements… are not legally correct or have the potential to cause detriment to our patients' health and safety.
>
> Even though we believe that an employee has the legal right in these or similar circumstances to terminate its health care workers, we think that termination of employees is not appropriate where a number were confused or given poor advice by a union that does not represent them. We think a more appropriate response is to advise you what actions Special Touch will take should this type of circumstance ever occur again.
>
> * * * *
>
> Please note that Special Touch recognizes that employees have the right to strike, provided that they do so in accordance with the law. In the future, aides who fail to act in accordance with the law or who forfeit their rights under law because of their conduct or by endangering patients will be subject to immediate dismissal.

It should be pointed out that although this June 14 letter stated that the Respondent was not intending to discharge any of the strikers involved in the present case, it did *not* offer to reinstate them to their former work assignments.

Therefore, while asserting that the Respondent decided not to discharge any of these employees, it did decide either **(a)** to put them back to their previous assignments at various times after the offers to return to work; **(b)** to reinstate them to different assignments, which in many cases had fewer hours and therefore reduced income; or **(c)** never offered to reinstate some to anything other than temporary positions. In at least one instance, strikers such as Zoila Nivelo, despite receiving the June 14 letter, never received any new assignment offers from the Respondent.

As to those individual cases where there is some dispute, I will discuss them separately below.

The General Counsel also alleges that the Respondent, by several of its agents, on a few occasions during the week preceding the strike, interrogated and/or threatened employees. These allegations are not all that significant in the broader context of this case and they will also

be discussed below.

III. Analysis

As stated above, there is substantial doubt in my mind as to whether this Respondent should be construed as a health care provider within the meaning of the Act.[6] The services provided by the Company are not medical services, albeit they are provided only after a client receives medical orders from a doctor or nurse to people whose conditions range from somewhat enfeebled to seriously ill or disabled. Obviously if these services were performed by employees working for or within a nursing home or hospital, their employer would be construed as a health related employer. But the services are performed in individuals' homes and are not medical services at all.

Nevertheless, this is an issue that need not be reached because the Union, acting on the assumption that the Respondent might be construed as a health related facility, decided to give the 10 day 8(g) strike notices that would be required if such was the case.

A fundamental right embedded in the National Labor Relations Act is the right of employees to engage in concerted strikes for the purpose of organizing for and obtaining union representation or attempting to improve their wages, hours or other terms and conditions of employment. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). Nor can an employer legitimately contend that employees who engage in a primary strike can be fired or otherwise disciplined because they failed to comply with a company rule such as one requiring them to get permission or give notice before they absent themselves from work. For if that were the case, then an employer could, by enactment of a private rule, nullify the public rights guaranteed by a statute of the United States. As stated by the Court in *NLRB v. Washington Aluminum, supra,*

> Section 10(c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which Section 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission the company's foreman was obtained.

When Congress passed the 1974 Health Care Amendments, the Board was empowered to assert jurisdiction over private institutions in the health care industry. As such, employees, unions, and employers were afforded essentially the same protections and obligations of the NLRA, on a national basis, as persons in other industries subject to the jurisdiction of the Board. Thus, privately employed health care employees, on a national basis, were now entitled to organize and join labor organizations, to bargain through representatives of their own choosing, and to engage in picketing or strikes to the extent not prohibited by Sections 8(b)(4) and 8(b)(7) of the Act. [7]

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[6] Section 2(13) states:

> The term ``health care institution'' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

[7] I am not unmindful that there are a limited number of other situations where strikes may not be protected by the Act. These would include sit down strikes, (where employees basically occupy the Respondent's premises); intermittent strikes; or strikes in breach of a valid no-strike clause where such a clause is a quid pro

Continued

Nevertheless, recognizing that the right to strike might present particular problems not present in other industries, Congress also enacted Section 8(g) which states:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties. [8]

Section 8(g) to the extent that it imposes a limitation on the right to strike, imposes merely a 10 day notice and waiting requirement. This however, was imposed only on unions and not employees. *Walker Methodist Residence and Health Care Center, Inc*., 227 NLRB 1630, 1631-32 (1977).

Notwithstanding that there is nothing in the Act that requires employees to give advance notice of a strike to an employer in any industry covered by the Act, the Respondent asserts that such notice should be required here because of an imminent danger to its clientele. Such a qualification on the right to engage in Section 7 concerted activity is not specified in this statute and even if it could be read into the Act, would not be applicable to the facts in this case.

For example, in *Bethany Medical Center*, 328 NLRB 1094 (1999), the Board held that employees in a catheterization lab were engaged in protected concerted activity even though they gave notice of a walkout only 15 minutes prior to the first scheduled procedure. The Board held that as this was a strike by employees, they were not required to give 8(g) notices. Also, the Board held that the minimal advance notice did not, in fact, endanger the health or safety of any patients. Although noting that it stated in *Marshall Car Wheel & Foundry Co*., 107 NLRB 314, 1953), enf. denied 218 F.2d 409 (5th Cir. 1955), that concerted activity may be "indefensible" where employee "fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger to sudden cessation," the Board held that the facts in *Bethany* did not rise to that level. It noted that although five patients were scheduled for the procedure, all of those cases were routine and that when the walkout occurred, the procedures were either delayed or the patients were transferred to one of about 20 other hospitals capable of performing the procedure in the near vicinity.

The Respondent also cites *Montefiore Hospital v. NLRB*, 621 F.2d 510 (2nd Cir. 1980). But the facts of that case are different. In that case, the Court held that certain doctors who

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quo for an arbitration provision in a collective bargaining agreement. However, none of those situations is relevant to the present case.

[8] Section 8(d) in pertinent part states:

> Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

were not represented by a union and who engaged in a sympathy strike without having given an 8(g) notice were nevertheless engaged in concerted activity that was protected by Section 7 of the Act. The Court rejected the Company's contention that the doctors were not engaged in protected activity because they did not give advance notice. The Court stated that if it adopted the position that any strike without notice by a doctor is unprotected, "we would in effect be rewriting Section 8(g) in the very manner we have concluded that Congress did not intend." In reversing certain of the Board's conclusions about the doctor's rights to backpay and reinstatement, the Court found that the doctors *after* commencing the strike, engaged in unprotected picket line activity pursuant to which they forfeited their reinstatement rights.

Assuming arguendo that an "imminent danger" qualification can be read into the Act's conference of the right to strike, the evidence does not establish that such a danger existed in this case.

The evidence shows that upon being given the 10 day notice, the Employer ascertained, with a fairly high level of accuracy, how many of its employees, regularly assigned to clients, would have to be replaced for the few days on which the strike would take place. To a limited extent, some employees who had responded to the Company's inquiries and had stated that they would go to work, decided to change their minds and to participate in the strike. At the end of the day on June 7, 2004, there were only about five clients for whom the Respondent could not get coverage. And as to them, there was no evidence that they suffered any adverse consequences. Nor did the Employer present evidence as to the particular disabilities or conditions of the five clients for whom replacement aides could not be immediately found. We therefore cannot even opine as to whether they were in any danger at all. (I also note that the aides who testified in this proceeding stated that even though they did not notify the Company of their intention to engage in the strike, they did notify family members of their clients).

The Respondent also argues that the employees' right to strike, absent some prior notice, was somehow affected by the fact that at the time of the strike, the Union had not yet obtained bargaining status pursuant to Section 9(a) of the Act. Frankly I don't understand this argument or how it could be relevant to the facts of this case. I therefore reject it.

Based on the above, I conclude that the employees in question were not required to give any notice of their intention to engage in a strike as such notice is not required by the clear and unambiguous provisions of Section 8(g) of the Act. I also conclude that the Employer has not proffered sufficient evidence to show that the strike or the failure of any individual to give notice of his or her intention to participate in the strike caused or could have caused any "imminent danger" to the Respondent's clientele.

Nor do I find that the Respondent has shown that it hired or transferred other employees to replace these strikers as permanent replacements. In this regard, an employer is entitled to hire permanent replacements for economic strikers and need not discharge the replacements to make room for the strikers. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 335 (1938), reaffirmed in *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967). However, it is incumbent on the Employer to establish that the replacements hired were in fact permanent and not merely temporary replacements. And in my opinion, the Respondent has not shown that in obtaining replacements for these strikers, that it hired or transferred employees as permanent rather than temporary replacements. *Chicago Tribune Co*., 304 NLRB 259, 261 (1991) (the employer must show a mutual understanding between itself and the replacements that they are permanent).

Therefore, when the Employer did not reinstate these strikers to their former positions of employment, immediately upon their offers to return to work, I conclude that the Respondent

has violated Section 8(a)(1) and (3) of the Act.[9] I also note that having offered to cease striking and to return to work, it was not the responsibility of the individual employees to seek new assignments from the Respondent. Rather, the obligation was on the Respondent to seek out these employees and offer then either their old jobs back or substantially equivalent employment if their old jobs were no longer available.

Among the 48 strikers who are involved in this case, most were reinstated to their former jobs at some point soon after June 14, 2004. As to the set of employees who were reinstated to their former jobs, the backpay owed to them would be the number of days from June 8 to the time that they resumed their former jobs. (In the cases of Altagracia Matos and Solia Peguero, it would be the number of days from June 10 to the time that they resumed their former jobs).

There were, however a group who were not reinstated to their former assignments and who had their hours of work substantially changed.

Norma Lindao, who had regular assignments with two clients before June 7, was given temporary assignments for a period until July 24, 2004 when she was given a new long term assignment. Nevertheless, even after this new assignment, the number of hours assigned to her remained below the number given to her before the strike.

Reina Santiago after participating in the strike on June 7, and returning to her client on June 8, was removed from that client. Apart from some brief temporary assignments, she was not given another regular assignment until August 2004.

Ramona Then had regular assignments with two clients before June 7; one during the week and another on the weekends. She participated in the strike on June 7 and when she went back to her weekday client on June 8, there was another aide present and she was told to go home. About two weeks later, Then was reinstated to her weekday client but was not reassigned to her weekend client.

Lidia Solano was assigned on a regular basis to a client during the weekdays from 9 a.m. to 1 p.m. She participated in the strike, notwithstanding having told the Respondent that she intended to work on June 7. On the afternoon of June 7, Solano told Metabel that she was going to return to work on June 8 and was told that she should not. After June 14 and until sometime in September 2004, Solano received some temporary assignments and was not reinstated to a permanent assignment until some time in September when she was given an assignment involving two twelve hour shifts on the weekends. (This would be 24 hours per week as opposed to her pre-strike assignment of 20 hours per week).

The General Counsel also contends that a small number of the strikers were either expressly fired or by being offered an insignificant numbers of assignments after the strike, were effectively fired.

Before the strike, Altagracia Matos had a regular assignment of 40 to 60 hours per week. She participated in the strike that began on June 7 but unlike most of the others who offered or attempted to return to work at their client's homes on June 8, Matos and another employee, Solia Perguero, participated in the strike through June 9. After the strike, she received the June

[9] In many instances, the employees made clear their intention to come back to work by either calling the Respondent on June 7 or by showing up at their clients homes on June 8. In any event, the Union's strike notice contains within its text, the offer to return to work on the morning of June 10, 2004 since the notice indicates that the strike would be over by June 10, 2004 at 6:00 a.m.

14 letter and testified that she attempted to call the Respondent for work on numerous occasions. Matos was never reinstated to her former client and received a minimal number or assignment offers after June 8.[10] Although Respondent's agent, Carmelita Wilson testified that a person from the Jewish Agency instructed the Respondent to not put Matos back with her client, the Respondent offered no explanation for this alleged instruction and did not present anyone from that agency to confirm or explain the circumstances.

Petra Ortiz, prior to the strike, had a client for whom she worked about 40 hours per week. She participated in the strike on June 7 and when she returned to the client on June 8, was told that she was being removed from the assignment. When the client protested the reassignment, the client terminated her relationship with the Respondent and went to another agency. At the same time, Ortiz quit the Respondent and went to work for the same agency chosen by the client. Thus, the two remained together after the strike. I suppose that since Ortiz's quitting came about as a result of the chain of events resulting from her participation in the strike; namely the Respondent's refusal to reinstate Ortiz to her client and the client's change of agency, her quitting should be construed as a constructive discharge. By the same token, I should note that her backpay probably would be very limited because she obtained immediate other employment and continued to work with the same client.

Prior to the strike, Maria Nieves had a regular assignment with a client with whom she had worked for more than three years. Nieves participated in the strike on June 7 but when she returned to the client's home on June 8, she was told by a supervisor that she had been removed from this client. From that date, Nieves received three short temporary assignment offers, one of which she refused because it was for only 4 hours.

Zoila Nivelo had two regular assignments before the strike, one during the week and the other on the weekends. She participated in the strike on June 7 but on June 8 when she showed up at her weekday client's home, she was told that she was no longer assigned to either the weekday or weekend clients. Nivelo testified that although she was told by the supervisor that she would be in touch with her, Nivelo has never been contacted by the Respondent and has not been offered any new assignments. She started working for another agency on June 15, 2004.

Before June 7, Lazarus Phillips worked with one client and was told on June 8, by coordinator Ann Marie, after he participated in the strike, that he should go home. He testified that she told him that he was terminated. (She did not testify for the Respondent). Phillips received the June 14 letter but asserts that he was not offered any reassignments.

The Respondent asserted through the testimony of Desiree Cooper that it believed that Phillips had quit. Cooper testified that she called him about reassignments after June 14 and that he told her that he didn't want to return to work and wanted to go back to his home country. In this regard, I note that Phillips was himself an elderly gentleman who had some difficulty in walking.

Cooper's testimony that Phillips told her that he wanted to go back to his home country was not implausible. Nevertheless, Phillips did show up at the client's home on June 8 and neither Cooper nor anyone else from the Respondent, confirmed in writing, that Phillips was

[10] The Respondent offered some evidenced that Matos was given several short term assignments in late June and in July 2004. These however, cannot be construed as constituting reinstatement to her former position of employment.

retiring or quitting his employment. This is not to say that the Respondent had to do so; only that in evaluating credibility, it seems to me that it would have been a simple matter for the Respondent to send a letter to Phillips either indicating that it meant to offer him assignments or that it understood that he no longer wished to work for them.

I am going credit the testimony of Phillips and conclude that he was ready, willing and able to work after June 8, and that the Respondent failed to offer him either his old assignment or any other assignments.

Melania Navarro, prior to the strike, had a regular assignment and on June 3 or 4 told the son of her client that she was going to participate in the strike on June 7. After initially participating in the strike, Navarro appeared at the client's home on the afternoon of June 7. Navarro testified that while there, she had a conversation with a coordinator through a Spanish translator who told her that she was irresponsible because she went on strike and that she was fired. Notwithstanding that testimony, I doubt very much that Navarro was told that she was fired, albeit she may have misconstrued the remarks. Given the other testimony and the overall pattern, I think that it is more probable that Navarro was simply told that she was being replaced by a substitute. In any event, the evidence shows that instead of accepting a replacement, the client son hired Navarro directly and then on or about June 24, transferred the client to another agency that hired Navarro to take care of her. The evidence does not show that the Respondent ever offered to reinstate or reassign Navarro.

Although the Respondent asserts that Navarro voluntarily quit, I don't think that the facts warrant that conclusion. While I doubt that Navarro was told that she was fired, the fact is that the Respondent intended to replace her with another aide. Assuming, as I do that the Respondent had a legal obligation to reinstate strikers to their former assignments when they offered to return to work, its failure to do so and Navarro's decision to accept other employment so that she could stay with the client would be tantamount to a constructive discharge. Of course, I note that her decision to accept other employment would obviously affect the amount of backpay, (if any), owed to her, although not affecting the Respondent's obligation to at least offer her reinstatement to an equivalent position.

The final person in dispute is Crecencia Miller who, prior to the strike, had two regular assignments. She participated in the strike on June 7 and later in the day she went to one of her client's home where she told the client and the replacement aide that she would be resuming work on June 8. Miller indeed arrived at the client's home on the following day and refused to leave when she was notified by the Respondent that she no longer was assigned to the client.

The Respondent contends that unlike the other aides, it did discharge Miller and did so for cause. It asserts that prior to the strike, the Visiting Nurse Association of Brooklyn, (VNAB), notified the Respondent that the client's family had complained about Miller and that it wanted Miller removed from the client. The Respondent asserts that it decided to reassign Miller from the client in question, not because of the strike but because of the request made by VNAB. It also asserts that when Miller refused to leave the client's home and effectively locked out the replacement it decided to discharge her. In a letter dated July 5, 2004, the Respondent wrote to Miller as follows:

> On Friday, June 4, VNAB requested that you be removed from your case because of patient and patient family complaints. We attempted to contact you during the weekend but you did not respond.

> Unlike some aides who were no call/no show for their cases on June 7th, you were not scheduled by us to work that day, as we had assigned another aide to this case due to patient complaints. The assigned aide came to work at the start of the shift that day and was caring for the patient when you arrived at the patient's home several hours late. Your coordinator was informed that you were at the patient's home and instructed you to leave so that the other aide … could continue with her work. Not only did you refuse to leave but you refused to answer the phone to speak o the coordinator after the initial call. At that moment in time, you were eligible to continue working for Special Touch but not for the patient who had complained about you.
>
> However, you refused to leave the home of the patient… This misconduct… continued on June 8th and June 9th as well… Your continual refusal to leave, after several requests and your refusal to follow the instructions of your supervisors led to termination from Special Touch….

In response to the Respondent's claim, the General Counsel produced Maria Jimenez, the client's daughter who testified that neither she nor her father ever complained about Miller to the VNAB.

When the Respondent called VNAB's Director of Human Resources, (who did not confirm that VNAB had requested the Respondent to remove Miller from the client), she testified that she had searched VNAB's records and could only find a file note which related to the Respondent's decision to discharge Miller despite the client's desire to keep her. This note which is General Counsel Exhibit 11 states:

> Informed by Glenda Pascal, RN, that she received ATC from director of the Vendor agency informing her that Crecencia Miller was dismissed from that agency yesterday, 6/8/04. However she reportedly returned to client's home today and repeated calls to home have not been answered. Ms. Pascal called Maria Jimenez, client's daughter, and this CM spoke jointly with her to Ms. Jimenez, informing her that Ms Miller is no longer employed by the vendor agency and therefore, cannot continue to provide service to client. Ms Jimenez stated that her father wants to keep worker and that she hasn't had any problems with the worker. Ms. Jimenez was instructed to contact worker and instruct her to leave client's home to avoid getting authorities involved and she reluctantly agreed to do so. She also requested a change of vendor by claiming misunderstanding with same on prior occasions.

In my opinion, the evidence given by the client's daughter and the representative of the VNAB tends to negate the Respondent's position and supports the General Counsel's allegation. Inasmuch as I conclude that the Respondent has not demonstrated that it had agreed with Miller's replacement that she would be a permanent replacement, the Respondent's failure to reinstate Miller to her former assignment when she effectively notified that she was going to resume work on the morning of June 8, constitutes a violation of the Act. Therefore, I also conclude that Miller's subsequent discharge, even if prompted by her refusal to leave the client's premises on June 8 and 9 would also violate Section 8(a)(1) & (3) of the Act.

The General Counsel produced several employee witnesses who credibly testified that on a number of occasions before the August 2004 election, they were questioned about their contacts with the Union or if they signed union cards. This was testified to by employees Miriam Perez and Soila Peguero and although not particularly serious, I find that these interrogations

violated Section 8(a)(1) of the Act. (I am not going to rely on the testimony of Basilia Martinez who related a conversation with a person who was not shown to be an agent, notwithstanding that this person was identified as an assistant to a supervisor).

Peguero testified that a coordinator, during the week preceding the strike, told her that the strikers would lose their jobs. She also testified that after receiving the election material in the mail, a coordinator told her that the Company would close if the Union won the election.

Although I have no reason to discredit Peguero, I think that it is more probable that she was told that if she went on a strike, she could be replaced, a statement which although legal, can easily be misconstrued as a threat of discharge. And as Peguero was the only person who testified about an alleged threat to close, I am not persuaded that this uncorroborated evidence is sufficient to conclude that the Respondent violated the Act in this regard. (Nor do I think that it would add anything to the other violations already found).

Conclusions of Law

By failing and refusing to reinstate economic strikers upon their unconditional offer to return to work, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) & (3) of the Act.

By discharging, constructively discharging, or changing the hours or terms of employment of employees because they engaged in a strike, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) & (3) of the Act.

By interrogating employees about their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the Respondent illegally refused to reinstate at least some of the strikers, or offer them their pre-strike assignments, it must offer them reinstatement to their former assignments or if those assignments are no longer available to substantially equivalent assignments and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As noted above, most of the strikers involved in the present case offered to return to work on June 8, 2004. To the extent that they were not reinstated on that date, the backpay for them would run from June 8, 2004. This, however, would not be the case for Altagracia Matos and Solia Peguero who offered to return to work on June 10 and whose backpay periods would start from that date.

To the extent that some of these strikers were reinstated, but not to their former

assignments, backpay would be the difference, on a quarterly basis, between their earnings after June 8 and their earnings before June 7.

As to those employees such as Crecencia Miller and Petra Ortiz who left with their clients and moved to other agencies, the net backpay for them would have to take into account the fact that they obtained interim employment almost immediately. Nevertheless, as they are construed by me to have been constructively discharged, this would not vitiate the Respondent's obligation to at least offer them reinstatement to substantially equivalent employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [11]

ORDER

The Respondent, Special Touch Home Care Services, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging, constructively discharging, suspending or otherwise refusing to immediately reinstate economic strikers who offered to return to work, to their former positions of employment or to substantially equivalent positions of employment.

(b) Interrogating employees about their support or activities for New York's Health & Human Service Union 1199/SEIU.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer to those strikers who have not yet returned to their former jobs, or to those who have had their hours or other terms and conditions of employment changed after the strike, immediate and full reinstatement to their former positions of employment or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole with interest, any of the strikers for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them to their former jobs in the manner described in the Remedy section of this Decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Order.

(e) Within 14 days after service by the Region, post at its facility in New York, copies of the attached notice in English, Spanish, Russian and Chinese, marked "Appendix A."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be mailed at its expense to its employees and posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.[13] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington D.C.

_____
Raymond P. Green
Administrative Law Judge

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[13] I am recommending that the Notice be mailed because the employees go from their homes to the homes of clients and rarely go to the Respondent's offices.

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, constructively discharge, suspend or otherwise refuse to immediately reinstate economic strikers who offer to return to work, to their former positions of employment or to substantially equivalent positions of employment.

WE WILL NOT interrogate employees about their support or activities for New York's Health & Human Service Union 1199/SEIU.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL offer to those strikers who have not yet returned to work or to those who have had their hours or other terms and conditions of employment changed after the strike, immediate and full reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make whole with interest, any of the strikers for any loss of earnings and other benefits suffered as a result of our refusal to reinstate them to their former jobs.

Special Touch Home Care Services, Inc.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.

APPENDIX B

The Respondent moved to correct the transcript in certain respects and the General Counsels agreed with many of the proposed changes. However, they objected to some and expressed no opinion about others. I asked the Reporting Service to double check the transcript as to any proposed changes where there might be a possible disagreement. On August 25, 2005, the Reporting Service sent me the results of its investigation also forwarded a copy to the parties.

Based on the documents submitted to me including the Reporting Service's report and my own review of the transcript, I hereby make the following changes to the transcript. Unless noted here, I have rejected any other proposed changes.

Page	Line	Change
110	15	(a) to aides
110	16	? to .
223		Caltagracia Matos to Altagracia Matos
231	20	areas to hours
233	31	Thirty to Eighty
250	13	CALTAGRACIA TO ALTAGRACIA
255	24	delete ha,
255	25	delete ha,
279	18	that to when
379	7	REJNA TO REYNA
382	8	Rajna to Reyna
384	2	Rajna to Reyna
424	22	(c) to (g)
426	4	United States to New York
426	7	a to of
426	7	healthcare to Healthcare
426	8	organization to Organizations
426	16	non to home
426	18	change to Yes
426	19	live-in to visiting
427	17	are to orders
428	7	these to aides
431	9	rally to really
431	15	likely to wide
432	7	planned to plan of
432	9	planned to plan of
433	9	release to nurse
433	24	order to audit
433	25	order to audit
434	2	contract to interact
434	2	contract to interact
434	20	Every to 20
437	7	our to your
437	10	prominence to permanence
437	10	of care to of home care
437	11	long to long cases

439	2	your record in your stats to your coordinators have
439	4	coordinator to coordinators
440	3	pension to payroll
443	8	Delete and
443	9	spelled out to 12 hours
446	3	EMs to LPN's
451	12	CP to VP
457	23	case to care
462	20	of to off
466	15	Personal to Special
470	8	nullification of to end of a patient assignment
470	25	purged to closed
477	25	share? To there?
505	3	are so many to are not so many
506	16	No to Right
506	22	originally to the original aide

507 7 The Respondent asserts there is some missing text. The Reporting Service indicates that her review shows: "Mr. Reibstein: Your Honor, I don't have the document now, but maybe we can supply them at a later pointing time." The Reporting Service informs us that at that point the tape was changed thereby causing the recording to stop until the parties were ready to resume.

507	10	we're going to get to when you got
508	14	additional to personal
510	6	site to strike
514	23	employee to employ
521	7	no show to with no shows
527	6	question to assumption
528	3	referendums to information
531	12	or to ,or
531	13	or to ,or
538	25	contest to process
540	13	floated to slowed
541	21	est to best
546	6	Sicasta to Acosta
547	7	yours to hours
547	12	Ara Unja to Alejandro Cabrera
549	24	Cynthia to Crecensia
552	2	Amaric Selsa to Amarillis Sosa
552	4	Avet to Ivette
556	15	subjective to subject
562	9	8036 to 803(6)
563	4	8036 to 803(6)
564	7	Seniors to Visiting Nurse
572	11	incidence to incident
578	13	Petro to Petra
578	15	Petro to Petra
579	4	Petro to Petra
580	9	determination to termination
580	9	factor to document
580	9	determination to termination
580	10	factor to notice
585	8	- to 599

605	24	Lindell to Lindao
606	5	Lindell to Lindao
619	2	Lindell to Lindao
619	3	Lindell to Lindao
619	4	Lindell to Lindao
630	5	Caltragracia to Altagracia
636	17	Caltragracia to Altagracia
642	10	Caltragracia to Altagracia
642	20	Caltragracia to Altagracia
709	10	Lindell to Lindao
721	23	Landow to Lindao
722	6	case to cases
722	11	Normal to Norma
722	15	Lindell to Lindao
722	17	Lindell to Lindao
722	20	Lindell to Lindao
723	2	Lindell to Lindao
723	20	Lindell to Lindao
725	1	7:00 by 12:00 to 7 by 12
742	10	Guiana to Guyana
745	15	Guiana to Guyana
748	15	Crascencia to Crecensia
748	17	Crascencia to Crecensia
748	20	Crascencia to Crecensia
750	14	Crascencia to Crecensia
750	16	Crascencia to Crecensia
750	18	Crascencia to Crecensia
751	12	Crascencia to Crecensia
755	14	Crascencia to Crecensia
755	18	Crascencia to Crecensia
757	10	All my aides to I asked all my aides
757	19	that I to if they
760	19	6,7 to 6/7
762	9	EMS to VNS
764	3	Salano to Solano
764	7	Salano to Solano
765	13	Zoila to Solano
766	4	Zoila to Solano
766	11	Zoila to Solano
766	12	Zoila to Solano